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Preventing Violence against Gay Men and Lesbians: Should Enhanced Penalties at Sentencing Extend to Bias Crimes Based on Victims' Sexual Orientation

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PREVENTING VIOLENCE AGAINST GAY MEN AND LESBIANS: SHOULD ENHANCED PENALTIES AT SENTENCING EXTEND TO BIAS CRIMES BASED ON VICTIMS' SEXUAL ORIENTATION?

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INTRODUCTION

Smithton, Pennsylvania, population 300, is a small town in western Pennsylvania where everyone knows everyone and everything about everyone. Like many small towns Smithton considers itself a closely knit community where common knowledge about each member encourages understanding and tolerance. The brutal killing of native son Paul Edward Steckman, however, shattered the assumptions Smithton residents had about community tolerance.[1] On March 27, 1994, the forty-six year old Steckman was beaten almost beyond recognition and left to die on the street.[2] He was one block from his mother's house, to which he had returned from New York City two years earlier to care for his ailing mother.[3] The brutal violence of this murder explains part of Smithton's shock; but more shocking still was accused killer seventeen year old Samuel Louis Sethman's assertion that the murderous beating was motivated by Steckman's homosexual advance towards him.[4]

Attitudes in the community toward Steckman's homosexuality had been mixed; a number of older citizens denied Steckman's homosexuality, even though Smithton's younger generation stated that he had been a known and obvious gay man.[5] When his "differences" had become obvious, when Steckman flirted with other men at local bars, when he did not hide his sexual preference, community response varied. For some, he was

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1. Tamar Lewin, *A Killing in a Small Town Becomes a Chastening Lesson in Intolerance,* N. Y. TIMES, Apr. 30, 1994, at A8.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

still a friend with a great sense of humor; others considered him a "fag" and talked about his needing a beating.[6]

Those attitudes about homosexuality colored perceptions about Steckman's killing. Some townspeople rationalized the murder as an extreme reaction to homosexual advances or as a result of aggression against gays being considered "manly" by teens.[7] But while some townspeople may have thought Steckman's sexual openness had gone too far for Smithton, all agreed that Sethman's response went too far for any community, especially their own.[8]

Smithton's experience exemplifies a large scale reexamination of attitudes about sexual orientation and violent crime. As violence motivated by bias against sexual orientation becomes more pronounced in American society, communities must respond by both punishing the crime itself and reducing the intolerant attitudes towards gay victims that cause the crime. One solution already used to respond to bias motivated violence involves enhanced penalties at sentencing for crimes motivated by bias against homosexuals. Traditional prejudices against homosexuality, however, often block the extension of statutory protection to bias based on sexual orientation; many states exclude sexual orientation in their hate crime statutes[9] or proscribe bias conduct so broadly that sexual orientation is not mentioned directly.[10]

This Article argues that bias crimes[11] based on actual or perceived sexual orientation require enhanced penalties at sentencing in order to assure that gay men and lesbians receive

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6. *Id.*

7. *Id.*

8. *Id.*

9. *See* COLO. REV. STAT. § 18-9-121 (West 1990); IDAHO CODE § 18-7902 (1987); MD. ANN. CODE art. 27, § 470A (Supp. 1994); MASS. GEN. LAWS ANN. ch. 265, § 39 (Law Co-op. 1992); MICH. COMP. LAWS ANN. § 750.147b (West 1991); MO. ANN. STAT. §§ 574.090-.093 (Vernon Supp. 1994); MONT. CODE ANN. §§ 45-5-221, -222 (1993); N.Y. PENAL LAW § 240.30 (McKinney Supp. 1993); N.C. GEN. STAT. §§ 14-3, 14-401.14 (1993); N.D. CENT. CODE §§ 12.1-14-04, -05 (1985); OHIO REV. CODE ANN. § 2927.12 (Anderson 1993); OKLA. STAT. ANN. tit. 21, § 850 (West Supp. 1995); 18 PA. CONS. STAT. ANN. § 2710 (1983); R.I. GEN. LAWS § 11-42-3 (1994); S.D. COD. LAWS ANN. § 22-19B-1 (Supp. 1994); W. VA. CODE § 61-6-21 (1992).

10. *See* IOWA CODE ANN. § 729.5 (West 1993); ME. REV. STAT. ANN. tit. 17 §§ 2931-2932 (West Supp. 1993); MASS. GEN. LAWS ANN. ch. 265, § 37 (Law Co-op. 1992); N.D. CENT. CODE § 12.1-14-05 (1985); TENN. CODE ANN. § 39-17-309 (1991); TEX. PENAL CODE ANN. § 12.47 (West Supp. 1994); UTAH CODE ANN. § 76-3-203.3 (Supp. 1994).

11. Throughout this Article I will use the terms "bias crime" and "hate crime" interchangeably to refer to criminal acts in which the perpetrator

protection under state and federal laws when they are victims of these crimes. Bias crimes by their nature create divisive social repercussions within the victim's group and the community at large; criminal acts committed against gays because of their sexual orientation reinforces intolerance of diversity. This Article therefore begins by examining anti-gay violence in the United States. Part I shows that the seriousness of these crimes is magnified by the vulnerable legal and social status of homosexual victims. These constraints marginalize gay men and lesbians in the American criminal justice system, giving homosexual victims a lesser standard of protection against violent crime than heterosexual victims.

States have recognized and addressed gay victims' marginalization by enacting statutes that enhance sentences for bias motivated crimes.[12] Part II addresses the constitutional questions raised by these types of statutes by examining the Supreme Court's decision in *Wisconsin v. Mitchell*.[13] Part III argues that if bias crimes against gay men and lesbians are a significant social problem, and statutes allowing for increased penalties for bias crimes are constitutional, bias crimes statutes should explicitly include sexual orientation as a category to be protected under these statutes. Without a specific assignment of criminal liability for intentionally selecting gay men and lesbians as victims, American criminal codes will not adequately protect homosexual victims, thereby allowing these victims' fundamental right to protection of person and property to be infringed. As enhanced sentencing statutes address the defendant's bias against the victim's status as a homosexual, these statutes would neither infringe upon states' rights to regulate homosexual behavior nor conflict with the moral teachings of the majority of religious organizations in the United States. Furthermore, by enhancing the punishment for gay bashing crimes, these laws would send a clear message that this type of bias violence will not be tolerated by our society.

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intentionally selected the victim because of the victim's actual or perceived sexual orientation.

12. This Article will not discuss the particular characteristics of the types of bias crime penalty enhancement statutes in effect today. For an overview of some of the specific provisions of these statutes, see Marguerite Angelari, *Hate Crime Statutes: A Promising Tool for Fighting Violence Against Women*, 2 AM. U. J. GENDER & L. 63, 67-70 (1994); Thomas D. Brooks, *First Amendment—Penalty Enhancement for Hate Crimes: Content Regulation, Questionable State Interests and Non-Traditional Sentencing*, 84 J. CRIM. L. & CRIMINOLOGY 703, 705-08 (1994) (student article).

13. 113 S. Ct. 2194 (1993).

I. VIOLENCE AGAINST GAY MEN AND LESBIANS

All bias crimes are violent crimes in which "the defendant's conduct was motivated by hatred, bias, or prejudice, based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individuals."[14] In general terms, a bias crime occurs when a defendant intentionally selects a victim as a result of the defendant's bias against the victim's actual or perceived identification with one of the protected groups. Bias is not an element of the underlying criminal offense itself.

To understand the reach of bias crime statutes, it is important to emphasize that it is the defendant's act of intentionally selecting the victim because of the defendant's bias that brings criminal liability. These statutes do not reach biased statements by the defendant that occurred outside of the context of an actual crime or are incidental to the commission of the crime. The defendant must select the victim and commit the crime because the defendant is biased against the victim. For example, in a random fight among passers-by in a non-gay neighborhood, if one person shouts anti-gay slurs, and one person happens to be gay, this does not necessarily violate a bias crime statute. A man who intentionally waits outside a gay club and assaults and robs a patron as she leaves, however, would clearly be committing a bias crime.

Bias crimes are a recognized problem in the United States, as statistical evidence tracks "[h]ate crime . . . [as] a geographically widespread, persistent pattern of criminal behavior of significant proportions."[15] These crimes cause repercussions which affect all of society. Bias crimes exacerbate social divisions within communities, leading to tension and even widespread violence, like the nationwide rioting that occurred after the first verdict in favor of the police officers in the Rodney King beating trial.[16] Bias crimes, therefore, not only perpetuate prejudice, they bring widespread social tension and possible physical destruction to communities.

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14. Leading Cases, *Penalty Enhancement for Bias-Motivated Crimes*, 107 HARV. L. REV. 234, 234 n.1 (1993) [hereinafter *Penalty Enhancement*] (quoting H.R. 4797, 102d Cong., 2d Sess. (1992)).

15. Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 407 (1994).

16. David Deitchman, Comment, *Limits on the Right to Hate: A Look at the Texas Hate Crime Act*, 46 BAYLOR L. REV. 399, 416 (1994). *See also* Sally Ann Stewart & Haya El Nasser, *Tensions Explode in L.A.*, USA TODAY, Apr. 30, 1992, at 3A (describing the rioting in Los Angeles after the April 29, 1992 acquittal of four white L.A. police officers in the beating of Rodney King, a black man).

All bias crimes damage communities because not only are individual persons victimized by the actual crime, but bias crimes inflict "unique psychic harm" on their victims[17] as a result of their being intentionally selected because of appearance or status. Anti-gay violence, therefore, is similar in effect to racial or ethnic violence because both serve "to perpetuate prejudice and victimize an entire class of persons."[18] Crimes against one individual because of that person's perceived status undermine confidence in the personal security of all who share that same status.[19]

Hate crimes against individual gay men and lesbians have a wider impact on the gay community. "In these types of assaults [heterosexuals attacking gays and lesbians], it is plausible to claim that the systematic victimization of one group by another leaves the members of the victimized group extraordinarily vulnerable and insecure."[20] Even if gay men and lesbians are not the direct victims of anti-gay violence, they share its effects.

> [M]any men and women in the gay and lesbian communities have escaped direct physical attack by perpetrators of homophobic violence. However, the horror and sinister efficacy of homophobic violence are in many ways like those of racist violence. Like people of color, gay men and lesbians always and everywhere have to live their lives on guard, knowing that they are vulnerable to attack at any time. Indeed, much of the efficacy of homophobic violence lies in the message it conveys to those who are not its immediate victims.[21]

If anti-gay crimes are considered criminal acts only because of their violence, the community fails to respond to this message. Bias elements in these crimes show society's intolerance of gay

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17. Note, *Hate is not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes*, 106 HARV. L. REV. 1314, 1314 & n.2 (1993) [hereinafter *Constitutional Defense*].

18. Note, *Developments in the Law - Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1541 (1989) [hereinafter *Sexual Orientation*].

19. *See* MARSHALL KIRK AND HUNTER MADSEN, AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE 90S 105-06 (1989). In describing the effects of violence against gay men and lesbians, the authors state that this violence "robs them of the sense of security that every citizen should have. It dampens or breaks their natural confidence, their social ease. . . . [G]ays . . . are constantly conscious of their stigma, and learn to circumvent abuse in public with an ever-present wariness." *Id.*

20. James B. Jacobs, *Hate Crime Legislation: Challenging Intolerance*, REPORT FROM THE INSTITUTE FOR PHILOSOPHY AND PUBLIC POLICY, Spring/Summer 1992, *reprinted in* CURRENT, Sept. 1992, at 18.

21. Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1464 (1992).

men and lesbians and exacerbate the oppression of homosexuals as a group.

Though violence against gays is an ongoing phenomenon, the increased visibility of gay rights issues has focused attention on anti-gay crimes. Debate over these issues brought attitudes about gays out in the open and may have increased both incidents and reports of anti-gay bias crimes. In 1992, when Colorado's voters passed Amendment 2, an anti-gay rights initiative,[22] numerous reports of bias crimes based on sexual orientation followed. As one gay Oregon man explains, "the words lesbian and gay are on people's lips and in their thoughts more than they ever have been before. . . . But as visibility is raised, so is the intensity, and the number of assaults and harassing incidents is clearly up."[23] Despite gains in awareness of sexual orientation discrimination issues, anti-gay violence still remains a significant social problem for American society.

A. *Statistical Evidence*

Bias against gay men and lesbians led to Paul Steckman's killing. Sadly, these bias crimes are being committed in communities throughout the United States. Paul Steckman's story is not an anomaly: anecdotal evidence and statistical records prove that gay men and lesbians are frequently targets of sexual orientation bias crimes.[24]

Recent studies provide statistical evidence of the nationwide frequency of bias crimes based on actual or perceived sexual orientation.[25] More and more lesbians and gay men are attacked

22. COLO. REV. STAT. ANN. § 30b (West 1994). Though this constitutional amendment was approved by voter initiative on Nov. 3, 1992, the Colorado Supreme Court has upheld a permanent injunction barring enforcement of the initiative. Evans v. Romer, nos. 945A48, 945A128, 1994 WL 554621 (Colo. Oct. 11, 1994).

23. John Woestendiek, *For Gay Americans, New Visibility and New Worry*, PHILA. INQUIRER, Nov. 22, 1992, at C1 (quoting Robert Ralph).

24. *See generally* Federal Bureau of Investigations, U.S. Dep't of Justice, Hate Crime Statistics, 1990 (1991) (reporting 425 anti-gay attacks out of the total of 4755 reported hate crimes in Connecticut, Massachusetts, Minnesota, New Jersey, New York and Oregon); NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE, ANTI-GAY/LESBIAN VIOLENCE, VICTIMIZATION & DEFAMATION IN 1991 19-20 (1992) [hereinafter ANTI-GAY/LESBIAN VIOLENCE].

25. This Article will not distinguish between the types of bias crimes that are committed against gay men and lesbians. Recent studies that track general characteristics of bias crimes against gays bring out shared characteristics that emphasize the seriousness of this problem. Professor Anthony Winer analyzed the patterns found in these bias crimes and discovered "identifiable and distinct patterns of criminal behavior in such perpetrators." *See* Winer, *supra* note 15, at 410-19. Winer found:

every year simply for being gay: anti-gay/lesbian violence rose 31 percent between 1990 and 1991 in five major cities (Boston, Chicago, Minneapolis/St. Paul, New York, and San Francisco).[26] These five major cities alone account for 1,898 hate crimes against gay men and lesbians in 1993.[27]

Criminal statistics are important in discussing bias crimes against homosexuals, for they identify trends and help fashion remedies. But the statistics themselves are problematic, as commentators contend that crime statistics are notoriously unreliable.[28] Gay activists, anti-gay rights groups and law enforcement officials all argue that current official statistics on hate crimes do not paint an accurate picture of the number of actual occurrences of hate crimes against gays. Statistics on crimes against gays vary greatly among these three groups' records and are hotly contested by opponents of homosexual rights and hate crime legislation.

Variations abound between gay activists' statistics and local law enforcement records. For example, 421 bias crimes against gay men and lesbians were reported to gay rights groups in Minnesota in 1992,[29] but only 30 incidents were recorded by Minnesota police.[30] The National Gay and Lesbian Task Force reported 1822 incidents in Boston, Minneapolis/St. Paul, Chicago, New York and San Francisco;[31] police in those cities record only 362 bias crimes.[32]

> [C]haracteristics typical of hate crime against lesbians and gay men [include]: gruesome and brutal execution of the crime, . . . "seeking out" behavior to intentionally locate and select the victim(s), [and] an implicit moral or social justification for the violence . . . . Although not all are present in all cases, and although there may be cases where none are present, each is a broad characteristic of the phenomenon.

Id. at 419.

26. William B. Rubenstein, *Introduction to* LESBIANS, GAY MEN AND THE LAW 1 (William B. Rubenstein ed. 1993).

27. Joseph P. Shapiro et al., *Straight Talk About Gays*, U.S. NEWS & WORLD REP., July 5, 1993, at 42.

28. *See* Jacobs, *supra* note 20. Jacobs argues that the statistical increase results from increased reporting rather than increasing amounts of crimes. He states that "[t]he perception of a crime wave may owe as much to increasing sensitivity as increasing violence. What appears to be a 'crime wave' may be explained in part by a greater willingness to regard and report certain crimes as bias-related, and by a better system for collecting and recording information about these offenses." *Id* at 18.

29. Mark Brunswick, *Gay Group Says Crimes are More Vicious*, STAR TRIB., Mar. 10, 1993, at 3B.

30. *Id.*

31. ANTI-GAY/LESBIAN VIOLENCE, *supra* note 24, at 1.

32. *Id.* at 12.

National statistics are not more consistent. Despite the passage of the Hate Crimes Statistics Act in 1990, problems still arise in obtaining statistical accuracy. The Hate Crime Statistics Act requires the F.B.I. to compile national statistics on hate crimes, including crimes targeting victims based on their actual or perceived sexual orientation.[33] The F.B.I., however, is the primary collector of only federal crimes committed against gays, a limited category; for state statistics, the F.B.I. relies on statistics provided by local authorities, if the state or municipality even tracks this information.[34]

B. *Problems with Reporting Bias Crimes*

Criminal statistics vary because of the numerous problems which arise when gay men and lesbians report bias crimes. If a jurisdiction does not have a hate crime statute or does not require data collection for hate crimes, no evidence about the occurrence of hate crimes will be available from that jurisdiction. Even when bias crime statutes and bias crime reporting acts exist, the victim's status as a homosexual makes reporting these crimes to authorities difficult for gay and lesbian victims.

Gay men and lesbians are more vulnerable as victims because they have many disincentives to report crimes to authorities. Reporting a crime under certain circumstances might unintentionally "out" the victim. For example, if the crime occurred in an identifiable gay neighborhood or near a known gay club, the resulting inferences could affect the victim's employment, housing and personal relationships. While victims may want to prosecute their assailants, they are too vulnerable as homosexuals in American society to be exposed in this manner.[35]

Lack of statutory protection against sexual orientation discrimination, therefore, stymies accurate reporting of bias crimes committed against gays because these circumstances unintentionally "out" the victim and make that "outing" public record.

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33. 28 U.S.C.A. § 534 (West 1994).

34. These variances in statistics are problematic, but they cannot be resolved within this Article's confines. This Article will focus not on the statistical discrepancies themselves, but on the reasons why these differences in bias crime data exist.

35. *See generally* KIRK & MADSEN, *supra* note 19, at 102-07; Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 572-73 (1992); Susan Finch, *New Orleans Panel Urges Gay-bashing Watch*, TIMES-PICAYUNE, Feb. 4, 1994, at B3; Ellen Nakashima & Marisa Osorio Colon, *In Effect Since 1990, State's Hate Crime Law Brings Few Convictions*, HARTFORD COURANT, July 19, 1993, at A1; Frank Trejo, *Silence Hurts Efforts to Solve Crimes Against Gays*, DALLAS MORNING NEWS, Jan. 31, 1994, at 21A.

Few state and local governments offer any protection from employment and housing discrimination against gay men and lesbians. The United States government had never banned discrimination based on sexual orientation in any of its programs until 1994.[36] Sodomy laws criminalizing homosexual conduct still exist in 24 states and the District of Columbia,[37] though violators are infrequently prosecuted.[38] Therefore, when perpetrators intentionally select a gay man or lesbian as their victim, they know they are attacking a victim whose vulnerability may discourage reporting of a bias crime.

Because gay victims are not able to press charges of bias crimes without exposing themselves to additional sexual orientation discrimination, many are unwilling to cooperate in prosecuting these cases. For instance, in Los Angeles, eight men were arrested for assaulting two men with baseball bats in an area frequented by gay men and lesbians.[39] Witnesses called police to report the attack, and police referred to the incident as an apparent "gay bashing."[40] Though all eight assailants were arrested within minutes after the attack, the victims of the attack have not been located.[41] Apparently the victims left the scene before the police arrived. "Gay bashing" crimes involve gay victims, and for

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36. Congress' earthquake assistance bill, signed in the wake of the January 17, 1994, California earthquake, was the first federal law to add sexual orientation to the list of groups protected against discrimination in distribution of disaster relief. Kenneth J. Cooper, *Hill Bans Gay Bias in Quake Aid*, WASH. POST, Feb. 19, 1994, at A1.

37. *Sexual Orientation, supra* note 18 at 1517. *See* ALA. CODE § 13A-6-65(a)(3) (1994); ARIZ. REV. STAT. §§ 13-1411 to -1412 (1989); ARK. STAT. ANN. § 5-14-122 (1993); D.C. CODE ANN. § 22-3502 (1989 & Supp. 1994); FLA. STAT. § 800.02 (West Supp. 1994); GA. CODE ANN. § 16-6-2 (1992); IDAHO CODE § 18-6605 (1987); KAN. STAT. ANN. § 21-3505 (1988); KY. REV. STAT. ANN. § 510.100 (Baldwin 1984); LA. REV. STAT. ANN. § 14:89 (West 1986); MD. CODE ANN. art. 27, §§ 553-554 (1987); MICH. COMP. LAWS §§ 750.158, 750.338-.338(b) (West 1991); MINN. STAT. § 609.293 (West 1987); MISS. CODE ANN. § 97-29-59 (1994); MO. REV. STAT. § 566.090 (Vernon 1979); MONT. CODE ANN. §§ 45-2-101, 45-5-505 (1993); NEV. REV. STAT. § 201.190 (Michie 1992 & Supp. 1993); N. C. GEN. STAT. § 14-177 (1993) (effective only until Jan. 1, 1995); OKLA. STAT. tit. 21 § 886 (West Supp. 1995); R. I. GEN. LAWS § 11-10-1 (1994); S. C. CODE ANN. § 16-15-120 (Law Co-op. 1976); TEX. PENAL CODE ANN. §§ 21.01(1), 21.06 (West 1994); UTAH CODE ANN. § 76-5-403 (1990); VA. CODE ANN. § 18-2-361 (Michie Supp. 1994). Of these statutes, seven states (Arkansas, Kansas, Kentucky, Missouri, Montana, Nevada, and Texas) only prohibit sodomy between persons of the same gender. *Sexual Orientation, supra* note 18, at 1520 & n.5.

38. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1424-25 n.32 (2d ed. 1988).

39. *8 Valley Residents Arrested in Attack*, L.A. TIMES, Sept. 26, 1994, at B3.

40. *Id.*

41. *Id.*

some lesbians and gay men, that public label can have too many repercussions.

C. *Police Relations with the Gay Community*

Another reason gay men and lesbians do not report bias crimes committed against them to the police stems from perceptions about the relations between the police and the gay community. Before and after the Stonewall riots of June 1969,[42] gay men and lesbians clashed with police nationwide over police treatment of gay victims, gay criminals, and crimes against gays.[43]

Individual episodes of police mistreatment of gay men and lesbians[44] lead to wide distrust of police by the gay community. With the continuing criminalization of sodomy in almost half of the United States, that mistrust is well grounded. Remember Michael Hardwick, whose arrest and trial triggered the Supreme Court's review of state sodomy statutes in *Bowers v. Hardwick*?[45] Hardwick's treatment by the police leaves little question why he challenged the constitutional validity of Georgia's sodomy statute, as he was grievously mistreated while in custody. Despite the presence of a bondsman when his arrest was processed, he was held in custody, and his arresting officers taunted and abused Hardwick while he was jailed.[46]

> While putting him behind bars . . . the jail officers made it clear to the other inmates that Hardwick was gay and had been charged with sodomy, saying, "Wait until we put him into the bullpen. Well, fags shouldn't mind - after all, that's why they are here."[47]

If these experiences are part of the common lore about the police that exists in gay communities nationwide, it explains why gay victims may hesitate to call police and might mistrust police or refuse to follow through with their complaints.

Mistrust and misconceptions about the gay community and the police lead to two problems. First, victims of sexual orienta-

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42. On June 27, 1969, the New York Police Department attempted to close down the Stonewall Inn, a gay bar in New York City's Greenwich Village. These police actions caused the patrons to riot and set off a string of riots throughout the following week. Many observers view the Stonewall Riots as the start of popular gay political activism. *See Introduction to Symposium, Stonewall at 25*, 29 HARV. C.R.-C.L. L. REV. 277, 277-78 (1993).

43. Fajer, *supra* note 36, at 572-73.

44. ANTI-GAY/LESBIAN VIOLENCE, *supra* note 24, at 19-20 (describing seven incidents of police abuse against gays).

45. 478 U.S. 186 (1986).

46. See TRIBE, *supra* note 39, at 1424-25 n.32.

47. *Id.*

tion bias crimes either do not report these crimes to police or they conceal evidence of bias when making their reports. Gay men and lesbians' past relations with police may contribute to present problems with accurate reporting of bias crime statistics. According to a 1989 study, 73 percent of victims of anti-gay violence did not report the incident to the police. Sixty-seven percent of these "had experienced or perceived the police themselves as homophobic. And 14 percent were afraid the police would bash them."[48] These findings seriously undermine the accuracy of police departments' statistics on anti-gay bias crimes.

Second, police may be disregarding evidence of bias crimes when investigating incidents involving gay and lesbian victims.[49] Some gay victims report that police miss evidence of bias when investigating crimes. In Dallas, Russell Carter was attacked because his assailant thought Carter was gay. Shouting anti-white and anti-gay slurs, the gunman attacked Carter and his two friends as all three left a bar in the predominantly gay Oak Lawn area and got into Carter's Jeep.[50] One of Carter's friends was shot when the three of them tried to escape from their attacker's attempt to abduct them.[51]

This assault, however, was not originally listed as a bias crime; police said that Carter and his friends "failed to mention any bias against gays as a possible motive."[52] Carter agreed that he had not said anything about the anti-gay comments. "When we made the report, we were still in such shock. The police officer was talking to us 30 to 45 minutes after it happened."[53] So Carter did not immediately report the anti-gay comments. Soon after the event occurred, however, Carter contacted police to add the anti-gay slurs their assailant used.[54]

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48. Fajer, *supra* note 36, at 572 (quoting Nat Hentoff, *A Case of Loathing: Gay Bashing is Out of the Closet. Again.*, PLAYBOY, May 1991, at 94, 96 (quoting study reported in the J. OF INTERPERSONAL VIOLENCE)).

49. Minkowitz, *supra* note 34, at 369. Minkowitz discusses the murder of Julio Rivera, in which the two defendants went out to assault a gay man, "lured" their victim, a gay bartender from the South Bronx, into a darkened corner, then beat him to his death. During the murder investigation "it took [the] police [N.Y.P.D.] nine months to classify the murder as a bias crime, and they never assigned a full-time detective to the murder. They let valuable . . . leads slip out of their hands because . . . they were reluctant to give credence to the statements of a gay prostitute who linked the three skinheads to the crime." *Id.*

50. Trejo, *supra* note 36, at 21A.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

When police are not trained to look for bias when investigating crimes, they do not question victims about details that lead to anti-gay bias crime charges. Even in predominantly gay areas, where the assault on Carter and his friends occurred, police did not ask if any link existed between the area, the victims, and the attack. Follow-up investigations also miss these details. Unless victims like Carter articulate evidence of bias, the bias crime is missed, and the perpetrator is not charged with the bias crime.

Even when ample evidence of a bias crime exists, it is no guarantee that police will conduct a hate crime investigation. When Michael Jones and Dave Mericle returned to their Phoenix home after work on the morning of September 16, 1994, they found their house ransacked, flooded and vandalized.[55] Spray painted on the shower wall, in large red letters was the word "FAG."[56] Above one bed, in red spray paint, read "HOMOS."[57] Other anti-gay slurs covered the walls in the hallway and family room, where chairs were slashed, antique china ruined, and holes punched into walls.[58] Despite this destruction,[59] Jones and Mericle discovered the intruders only stole some beer.[60]

Despite clear evidence of bias against this homosexual couple, Phoenix police did not dispatch a hate crimes detective until after eight hours had passed, and only after anti-violence activists called to request one.[61] A Phoenix police spokesman admitted that communication within the department had broken down, stating that "[i]n this particular case there perhaps should have been a quicker notification . . . . It's not supposed to happen that way. But in this case it did."[62] Unfortunately, many gay men and lesbians believe that this is the case more often than not when bias crimes against gays occur.[63]

These problems converge into telling statistics: for instance, the Chicago-based Anti-Violence Project of Horizons Community Services documented 204 incidents of hate crimes against Chicago-area gays in 1993; the police received reports in only 34 of

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55. Russ Hemphill, *Angry Gay Couple Offers Tours of Vandalized Home*, PHOENIX GAZETTE, Sept. 17, 1994, at A1.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Gay Couple's House Targeted by Vandals*, ARIZ. REPUB., Sept. 17, 1994, at B2 (reporting that $25,000 in damage was done to Jones and Mericle's house).

60. Hemphill, *supra* note 56, at A1.

61. *Id.*

62. *Id.*

63. *See* Minkowitz, *supra* note 34, at 368.

these incidents to the police; and 29 of these incidents involved police officers.[64]

Reporting a crime as a bias crime is important. Accurate reporting of bias crimes supports the significance of these crimes to gay men and lesbians. More importantly, it focuses police work on the acquisition of evidence related to the bias incident, increasing the chances of a conviction for the bias crime. It also publicizes the fact that crime against gay men and lesbians will not be ignored by the criminal system.[65]

Police department remedies are limited in scale and scope and fail to compensate for other deficits in the criminal justice system for gay and lesbian victims. Without enhanced penalties at sentencing for these bias crimes, measures such as better bias crime identification and investigation training are effectively stifled because criminal convictions for bias incidents receive the same punishment as other violent assaults without any biased victim selection. Without penalty enhancement statutes, police have no incentive to investigate bias evidence, because it is not guaranteed to have any effect on the perpetrator's punishment.

D. *Criminal "Justice" for Gay Victims*

When bias crimes based on sexual orientation are reported and police investigations confirm these charges, three specific problems for gay victims arise within the criminal justice system. First, prosecutors may decide not to charge a bias crime, because these crimes require a high standard for prosecutors to prove the biased intent of the defendant. Second, judges and juries can be prejudiced against gay victims, which influences either the outcome or the sentence in bias crime cases. Third, some courts allow defendants in gay bashing cases to use "homosexual advances" or "homosexual panic" defenses to excuse the defendant's criminal liability for the attacks against gay victims and undermine efforts to punish violence against gay men and lesbians.

1. Charging Crimes as Bias Crimes

When gay and lesbian victims contact the police, and arrests are made based on anti-gay, criminal acts, there is no guarantee that the incident will be charged as a hate crime. Elizabeth Najamy, a lesbian, had beer bottles thrown through her window by Lance Abbott, a former neighbor, while he shouted "Dykes get

64. Tom Seibel, *Hate Crimes Against Gays Dip 19% Here*, CHI. SUN TIMES, Mar. 9, 1994, at 12.

65. *See* Minkowitz, *supra* note 34, at 369.

out!"[66] New Haven prosecutors did not charge Lance Abbott with a hate crime. Under Connecticut law,[67] making it a felony to intimidate another out of bias and bigotry, this assault against Najamy did not qualify as a hate crime, despite Abbott's comments about her sexual orientation.[68] The prosecutor's office stated that Najamy was not intimidated by Abbott's statement because she and two friends threw trash at him and started down the stairs from her apartment to confront him.[69] The prosecutors disregarded clear evidence of Abbott's intent to intimidate by focusing instead on the victim's conduct.

Many crimes against gay men and lesbians are not charged as bias crimes because of the concern about satisfying the burden of proof. To convict someone under most hate crime statutes, the prosecutor must prove beyond a reasonable doubt both the elements of the underlying crime and the intentional selection of this victim by the defendant based on the victim's actual or perceived sexual orientation. This is a difficult standard of proof, as the defendant's abstract beliefs or past comments do not fulfill this element.[70] It is the defendant's intentional bias in selecting this gay victim in this crime that must be found and proved.[71] These crimes require that the perpetrator's biased intent be clearly manifested in the attack on the victim for the bias crime to be charged. When a prosecutor must prove that a defendant had biased intent in selecting a particular victim, it might jeopardize a conviction for the underlying criminal offense, because it draws attention away from the criminal elements of the underlying act.

2. Courtroom Prejudices Against Gay Victims

Because bias crime prosecutions indirectly focus attention on the victim's status, prejudices against gay men and lesbians are brought into the courtroom. These attitudes are then exploited by defense attorneys to rationalize anti-gay violence.[72]

Judge and jury prejudice against homosexual victims can manifest itself in lighter sentences against their perpetrators.

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66. Nakashima & Colon, *supra* note 36, at A1.

67. CONN. GEN. STAT. ANN. § 53a-181b (West Supp. 1994).

68. Nakashima & Colon, *supra* note 36, at A1.

69. *Id.*

70. *See* State v. Mitchell, 485 N.W. 2d 807, 822-25 (Bablitch, J. dissenting), *rev'd*, Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993).

71. *Id.* at 825.

72. *See* Minkowitz, *supra* note 34, at 368; Nakashima & Colon, *supra* note 36 at A1; *Judge is Censured Over Remark on Homosexuals*, N. Y. TIMES, Nov. 28, 1989, at A28.

This prejudice can be overt or implied; in either instance, if it results in a lesser sentence or acquittal, there may not be enough evidence to prove prejudicial error occurred at the trial level.[73] Unless the judge specifically expresses a prejudicial reason for the lower sentence or gives an outrageously low sentence for a bias crime, no obvious sexual orientation discrimination can be proven.[74]

If no overt prejudice is displayed by judge or jury, but the victim's acts are given as one reason for a lighter sentence, it sends a strong message to the gay community. That message states that because of their status as homosexuals, they will be perceived as wrongdoers themselves, and this perception may influence the judge or jury's impressions of the events and the ultimate disposition of the case. Even when considerations of the victim's conduct are legitimate, the gay community perceives these inquiries as anti-gay, and this undermines their belief in the fairness of the criminal justice system.[75]

The criminal justice system can contribute to the problems of accurate bias crimes reporting. Courtroom prejudices against gay men and lesbians as victims discourages these victims from prosecuting bias crimes even while other attempts are made to encourage these victims to report and prosecute these crimes. Victims have no incentive to prosecute bias crimes when they

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73. Texas' State District Judge Jack Hampton sentenced a convicted killer, Richard Lee Bednarski, to 30 years instead of life in prison for his murder of two men in a Dallas park in May 1988. Hampton told a reporter that he imposed the lesser sentence in part because the victims were two gay men " 'cruising the streets picking up teen-age [sic] boys.' " *Judge is Censured Over Remark on Homosexuals*, N. Y. TIMES, Nov. 28, 1989, at A28. Though Hampton was censured for his comments by the Texas State Commission on Judicial Conduct, a fact-finding panel concluded that Hampton's biased statements had not affected Hampton's judgment in the case.

74. *See* Stephen Hunt & Sheila R. McCann, *Is Utah Judge Unjust or Just Doing His Job?* SALT LAKE TRIB., Aug. 21, 1994, at A1 (discussing Utah 3rd District Judge David S. Young's lowering of murderer David Nelson Thacker's sentence from the plea bargain's recommended 1 to 15 years to 6 years in the murderous shooting of a gay man, Douglas Koehler).

75. *See* Bob Egelko, *Activists Vow Appeal of 'Basher' Decision; No Legal Malice?*, NAT'L L.J., Sept. 11, 1989, at 16. The California State Court of Appeals reduced the second degree murder convictions of three men to involuntary manslaughter after finding that the state had not proven elements of malice necessary to convict on the greater charge. Despite the legitimate basis for the Court's action, the ire of local gay rights activists was raised because these men had assaulted the victim, shouted anti-gay slurs, and knocked him to the ground before driving off, laughing. The victim died as a result of the injuries he received when he hit his head after being knocked down. Local gay rights activists described the decision to reduce the charges "a homophobic opinion [couched] in legal theory." *Id.*

have little assurance that these charges will lead to accurate sentences, while they risk "secondary victimization"[76] as homosexuals when their homosexual status becomes known.

3. Homosexual Advance Defenses

Homosexual advance defenses create a disincentive to report anti-gay bias crimes because the gay community perceives that the victim's homosexual status becomes the focus of the defendant's defense. The victim's homosexuality may allow the defendant to assert two particular defenses in bias murders. First, some courts allow defendants to assert a "homosexual panic" insanity defense.[77] A second defense allows the "gay advance defense"[78] as a type of self-defense or heat of passion defense for these defendants.

When defendants are tried for the violent crimes they commit against gays, they can raise these homosexual advance defenses to mitigate their crimes. These defenses excuse the assailants' acts as a panicked or passionate response to homosexual advances, a "presumably . . . terrifying and disgusting event"[79] that should lessen a "reasonable" defendant's culpability for the offense.[80]

If either homosexual advance defense results in a lesser sentence, gay men and lesbians sense courts' unwillingness to protect homosexuals to the same extent as heterosexuals are protected. When courts allow this defense, and validate it with acquittals, the impact is far reaching. Recognizing homosexual panic as a mental disease or defect diminishes individual responsibility for the consequences of bias prejudice, and accepts such

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76. Winer, *supra* note 16, at 413-15.

77. This defense asserts that the defendant has latent homosexual feelings which have remained severely repressed. When the victim made a nonviolent homosexual pass at this defendant, the defendant had a psychotic reaction which caused the defendant to lose the ability to tell right from wrong. The defendant then became panicked and responded violently, killing the victim in this insane rage. Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation.* 80 Cal. L. Rev. 133, 135 (1992) (citing Robert G. Bagnall et al., Comment, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties,* 19 HARV. C.R.-C.L. L. REV. 497, 499 (1984)).

78. *Id.* at 135. This defense allows the defendant to argue that, when faced with a nonviolent homosexual pass, a reasonable person could find this to be reasonable provocation for the defendant to react violently. If the finder of fact makes this finding, it reduces a murder charge to voluntary manslaughter.

79. KIRK AND MADSEN, *supra* note 19, at 58.

80. *Id.*

behavior as unchangeable and unavoidable, thereby encouraging its reoccurrence.[81]

Juries need to hear about the defendant's perceptions, because these are crucial to establishing the defendant's intent. But these defenses propose that the defendant's irrational bias against gays excuses the defendant's violent reaction. These defenses allow, even reward, homophobic violence because hatred of homosexuals becomes a reasonable excuse for committing a violent crime against gay men and lesbians.

> The continued use and acceptance of this defense sends [the] message to juries and the public that if someone makes a homosexual overture, such an advance may be sufficient provocation to kill that person. This reinforces both the notions that gay men are to be afforded less respect than heterosexual men, and that revulsion and hostility are natural reactions to homosexual behavior.[82]

Instead of focusing on the defendant's criminal act, judges and juries evaluate the nature of the victim's conduct, and a conviction may rest on their perceptions about homosexuals and homosexuality.

> If the defendant [in a murder case] can persuade the trier of fact that the victim's conduct was sufficiently egregious to inflame the passions of a reasonable man, then the defendant is guilty only of manslaughter. When that behavior is alleged to be homosexual in character, prevailing cultural climate more than normative and objective elements on which manslaughter theory is dependent affects the ultimate verdict.[83]

Criminal justice goals of deterrence and retribution are thwarted. These defenses use the defendant's bias to excuse the defendant's crimes, so they do not deter a person from selecting their victim based on bias. Society does not receive adequate retribution for these crimes because the real problem of the defendant's bias is disregarded.

These flaws in the criminal justice system help explain the statistical variances in bias crimes and highlight the particular problems involved with reporting and prosecuting crimes against gay men and lesbians. The criminal justice system cannot counteract the individual and social consequences of bias crimes through traditional criminal statutes and sentencing.

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81. *Sexual Orientation*, *supra* note 18, at 1544.
82. Mison, *supra* note 78, at 136.
83. *Id.*

Because bias crimes based on sexual orientation have a direct, destructive impact on gay men and lesbians individually and collectively, effective prosecution and punishment of these crimes demands priority in our legislatures and courts. Because numerous problems exist in reporting and prosecuting bias crimes involving sexual orientation, special emphasis on protection of gay victims is needed. Bias crimes, therefore, deserve special attention from courts and legislatures, as well as from society at large.

II. *WISCONSIN V. MITCHELL*: THE CONSTITUTIONAL STANDARD FOR BIAS CRIMES

If a defendant is convicted of a crime involving bias in victim selection, but is only punished for the underlying criminal offense, the crime has not been adequately punished. Since Blackstone's times, courts and legislatures have realized that "it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness."[84] Today, some legislatures realize that bias crimes fit this category because bias crimes victimize social classes and have divisive effects.[85] As traditional criminal sentencing does not effectively punish bias crimes, legislatures have responded to this problems by expressly requiring enhanced penalties at sentencing for crimes involving bias. Legislatures have passed statutes enhancing sentences for felonies and misdemeanors if evidence of the defendant's bias against the victim's race, ethnicity, religion, gender or sexual orientation can be proven at trial to have led to the defendant's victim selection.[86]

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84. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2201 (1993) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *16).

85. *See supra* text accompanying notes 15-22.

86. "At the state level, the response to reports of bias related crime has been significant. Nearly every state in the country has enacted some form of hate crime legislation." *Constitutional Defense, supra* note 17, at 1315. *See* CAL. PENAL CODE §§ 422.6, 422.7, 422.75 (West 1988 & Supp. 1994), § 1170.75 (West 1985 & Supp. 1994); CONN. GEN. STAT. ANN. § 53a-181b (West Supp. 1994); D.C. CODE ANN. § 22-4003 (Supp. 1994); FLA. STAT. ANN. § 775.085 (West 1992); ILL. ANN. STAT. ch. 720, sec. 5/12-7.1 (Smith-Hurd Supp. 1994); ILL. ANN. STAT. ch. 730, § 5/5-5-3.2(10) (Smith-Hurd Supp. 1994); IOWA CODE ANN. § 729A.2 (West 1993); MINN. STAT. ANN. § 609.595, Subds. 1a, 2(b); § 609.2231, Subd. 4 (West Supp. 1994); NEV. REV. STAT. ANN. § 207.185 (Michie Supp. 1993); N.H. REV. STAT. ANN. § 651:6(g) (1993); N.J. STAT. ANN. §§ 2C:12-1c, :33-4d, :44-3e, :43-7a(5) (West Supp. 1994); OR. REV. STAT. §§ 166.155, .165 (1990); R.I. GEN. LAWS § 11-5-13 (1994); VT. STAT. ANN. tit. 13, § 1455 (Supp. 1994);

The statutory provisions of most states give additional criminal penalties for crimes punishable under other penal code sections when these crimes are committed because of bias against the victim.[87] Under most of these crime codes "[p]enalties may be enhanced either by reclassifying the underlying offense as a more serious crime or by finding the defendant guilty of an additional offense of 'intimidation' or 'harassment.' "[88]

The Supreme Court recently addressed the constitutionality of these bias crime sentencing enhancement statutes in *Wisconsin v. Mitchell*.[89] This case concerned a Wisconsin statute which allows for penalty enhancement when evidence of biased selection of victims is present.[90]

WASH. REV. CODE ANN. § 9A.36.080 (West Supp. 1994); WIS. STAT. ANN. § 939.645 (West Supp. 1993).

87. *Constitutional Defense*, supra note 17, at 1315.

88. *Id.*

89. 113 S. Ct. 2194 (1993).

90. WIS. STA. §§ 939.645 (1989-90), *quoted in Mitchell*, 113 S. Ct. at 2197 n.1, provided at the time of Mitchell's trial:

(1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):
   (a) Commits a crime under chs. 939 to 948.
   (b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

(2) (a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.
   (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.
   (c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

(3) This section provides for enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

Mitchell arose out of an incident occurring on October 7, 1989.[91] A group of young black men, including the defendant Todd Mitchell, were gathered at an apartment complex. The group's conversation turned to a racially charged scene from the movie "Mississippi Burning" in which a white man beats a black boy who was praying.[92] The group moved outside; a young white boy walked by.[93] Mitchell said, "[y]ou all want to fuck somebody up? There goes a white boy; go get him" as the boy walked past.[94] Mitchell then counted to three and pointed in the boy's direction; the group ran after the boy, beat him severely, and stole his tennis shoes.[95] The boy spent four days in a coma.[96]

Mitchell was found guilty of aggravated assault, which in Wisconsin carries a maximum sentence of two years.[97] But because the jury found that Mitchell had intentionally selected his victim because of the boy's race, his sentence was enhanced to a maximum of seven years.[98] Mitchell was sentenced to four years.[99]

Mitchell challenged the constitutionality of this statute on First Amendment and Fourteenth Amendment grounds, arguing that the statute impermissibly infringed on his protected rights of freedom of speech, due process and equal protection of the laws.[100] Because his criminal conduct received more punishment because he selected his victim because of the victim's race, Mitchell argued that statutes enhancing penalties for conduct motivated by a discriminatory point of view impermissibly punished him for his beliefs.[101] His appeal was rejected by the Wisconsin Court of Appeals; the Wisconsin Supreme Court reversed his conviction, however, finding that the statute in question violated Mitchell's First Amendment rights.[102]

In an unanimous decision, the United States Supreme Court reversed the Wisconsin Supreme Court, declaring that these sentencing enhancement provisions for bias crimes did not infringe

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The statute was amended in 1992; those amendments were not at issue in the *Mitchell* decision. *Mitchell*, 113 S. Ct. at 2197 n.1.

91. *Mitchell*, 113 S. Ct. at 2196.
92. *Id.*
93. *Id.*
94. *Id.* at 2196-97.
95. *Id.* at 2197.
96. *Id.*
97. *Id.*
98. *Id.* (applying WIS. STAT. § 939.645 (1)(b), *supra* note 91).
99. *Id.*
100. *Id.* at 2197 n.2.
101. *Id.* at 2198.
102. *Id.* at 2197.

on constitutionally protected speech.[103] The Court held that violent crime intended to express an idea is not expressive conduct protected by the First Amendment.[104]

Chief Justice Rehnquist's opinion recognized that judges have traditionally considered "a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant."[105] Though a defendant's "abstract beliefs" cannot be taken into account by the judge when sentencing, " 'the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.' "[106] Justice Rehnquist emphasized that in criminal trials

> [t]he First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like.[107]

Relying on precedents which allocate responsibility to set criminal penalties to the state legislatures,[108] the *Mitchell* Court found that Wisconsin's statute punished bias-inspired conduct because its legislature found that "this conduct is thought to inflict greater individual and societal harm . . . [as] bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest."[109] The Wisconsin Legislature's reasons provide "an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases."[110] The *Mitchell* Court found that this statute, therefore, expresses a legitimate state purpose for its enactment that does not regulate speech and is aimed at conduct unprotected by the First Amendment.[111]

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103. *Id.* at 2197.

104. *Id.* at 2199. The *Mitchell* Court did not address Fourteenth Amendment issues, as those claims had not been analyzed by the Wisconsin Supreme Court.

105. *Id.* at 2198-99 (citations omitted).

106. *Id.* at 2200 (quoting Dawson v. Delaware, 112 S. Ct. 1093, 1094 (1992)).

107. *Id.* at 2201.

108. *Id.* at 2200 (citing Rummel v. Estelle, 445 U.S. 263, 274 (1980); Gore v. United States, 357 U.S. 386, 393 (1958)).

109. *Id.* at 2201 (citations to Wisconsin's brief omitted).

110. *Id.*

111. *Id.*

Opponents of *Mitchell* objected that state punishment of biased intent punishes both speech and expression protected by the First Amendment.[112] Because Mitchell's conviction "appears to have resulted solely from his speech,"[113] the only evidence available in this case to establish the bias crime was his speech.[114] When states punish criminal conduct motivated by bias, these opponents argue, these laws punish defendants for their speech.[115] Under *Mitchell*, therefore, the state's right to punish crimes trumps the defendant's right to express unpopular ideas protected by the First Amendment.

The *Mitchell* court, however, did not find that the Wisconsin statute regulated speech, deciding that this statute was a constitutionally permissible content-neutral regulation of conduct.[116] Justice Rehnquist also dismissed the claim that these regulations might restrict free speech as "speculative." The *Mitchell* Court refused to accept as plausible a hypothesis that suggests "a citizen [would be] suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a . . . serious offense against person or property."[117] These bias crime provisions are not constitutionally overbroad and therefore have no "chilling effect" on protected speech.[118]

A second objection to the *Mitchell* decision is that it infringes on protected expressive conduct.[119] Opponents argued that Mitchell's conduct fulfilled the Court's requirements to be considered expressive conduct under the First Amendment.[120] Furthermore, because Mitchell's conduct meets the definition of expressive conduct, the Wisconsin statute must then pass the test for permissible regulation of expressive conduct as set out in *United States v. O'Brien*.[121]

Although the *Mitchell* court did not hold that the Wisconsin statute regulated expression and so did not analyze it under First

112. Brooks, *supra* note 12, at 723.

113. *Id.* at 724 (arguing that Mitchell's conviction may have resulted onlly from his encouragement to the others to commit the crime, though Mitchell may not have participated in the beating, as he maintained).

114. *Id.* at 725.

115. *Id.* at 725.

116. *Mitchell*, 113 S. Ct. at 2200 (analogizing the role of motive in the Wisconsin statue to federal and state anti-discrimination laws as "permissible content-neutral regulation of conduct." *Id.*).

117. *Id.* at 2201.

118. *Id.* at 2194.

119. Brooks, *supra* note 12, at 729.

120. *Id.* at 729-30 (arguing that Mitchell's acts met the requirements for expressive conduct as set in *Spence v. Washington*, 418 U.S. 405 (1974)).

121. 391 U.S. 367 (1968).

Amendment jurisprudence, it is worthwhile to examine this statute under that light to answer *Mitchell*'s critics. Accepting arguendo that Mitchell's conduct meets the requirements to be considered expressive conduct, a review of the Wisconsin statute under the Court's speech/conduct regulation test in *O'Brien*[122] shows that the statute would survive constitutional scrutiny even if it were held to involve expression.

Under the analysis set out in *O'Brien*, four prongs must be satisfied to justify statutes which regulate expression and which incidentally interfere with First Amendment rights.[123] The Court stated:

> "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[124]

Using the reasons expressed in the *Mitchell* court's opinion, this statute fulfills all four prongs of this analysis, and is therefore justified. The first prong is satisfied by the Wisconsin legislature's constitutional right to enact this type of statute. States have always had the right to legislate matters concerning public safety; the Tenth Amendment allows the Wisconsin Legislature to enact criminal laws regulating conduct and sentencing procedures.[125]

The second and third prongs of the *O'Brien* test are also satisfied by the Wisconsin statute. As Justice Rehnquist stated in his opinion, the Legislature found that "bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional crimes on their victims, and incite community unrest."[126] The Wisconsin legislators' concerns about the social consequences of bias crime relate to the government's substantial interest in promoting the general peace; it is unrelated to the suppression of free speech.[127]

O'Brien's fourth prong requires that "the incidental restriction on alleged First Amendment freedoms is no greater than is

122. *Id.*
123. *Id.* at 376.
124. *Id.* at 377.
125. U.S. CONST. amend X.
126. *Mitchell*, 113 S. Ct. at 2201.
127. *Id.* at 2200.

essential to the furtherance of that [state] interest."[128] Because the Wisconsin statute requires a high standard of proof for a conviction under this statute, it severely limits any incidental infringement on the defendant's First Amendment rights. To convict a defendant under this statute, not only must the prosecutor prove beyond a reasonable doubt that the defendant committed the crime, she must also prove beyond a reasonable doubt that the defendant acted because of a biased motive directly related to the underlying criminal act. The requirement that the trier of fact find, by way of a special verdict, that the defendant acted with this bias for a conviction under this statute fully satisfies the requirements of the fourth prong of the *O'Brien* test.[129] Because all four prongs of the *O'Brien* test are satisfied, even if the *Mitchell* court had found that this statute did incorporate speech and non-speech elements, the statute would not infringe upon protected speech under *O'Brien*'s four-prong test, and so would be upheld as constitutionally valid.[130]

The *Mitchell* court explicitly concluded that its ruling on hate crimes in *Mitchell*[131] did not contradict its decision regarding hate speech laws in *R.A.V. v. St. Paul*.[132] As the court discussed in *Mitchell*, the Wisconsin statute only reached the defendant's conduct, while the St. Paul, Minnesota municipal ordinance at issue in *R.A.V.* expressly prohibited certain speech by restricting "the use of 'fighting words' that insult or provoke violence, 'on the basis of race, color, creed, religion or gender.' "[133] In *R.A.V.*, a juvenile was convicted of violating a city ordinance against hate speech when he was found guilty of lighting a cross in a black family's yard. The *R.A.V.* court held that the ordinance violated the First Amendment, as biased speech or expressive conduct directed at the groups protected by the statute could not be made a criminal offense unprotected by the First Amendment.[134]

In *Mitchell*, Justice Rehnquist distinguished hate *speech* statutes, such as that in *R.A.V. v. St. Paul*,[135] from hate *crime* statutes, like Wisconsin's, which are constitutionally permissible because

128. *O'Brien*, 391 U.S. at 377.

129. WIS. STAT. § 939.645 (3) (1989-90); *see supra* note 91.

130. One commentator argues that hate crime statutes may even encourage speech, because they deter "the alternative of physical abuse." *Penalty Enhancement*, *supra* note 13, at 242 (footnote omitted).

131. *Id.* at 2195.

132. 112 S. Ct. 2538 (1992).

133. *Mitchell*, 113 S. Ct. at 2200.

134. *R.A.V.*, 112 S. Ct. at 2538.

135. *R.A.V.*, 113 S. Ct. at 2538.

they regulate conduct outside the reach of the First Amendment. "[W]hereas the ordinance struck down in *R.A.V.* was explicitly directed at expression . . . the statute in this case is aimed at conduct unprotected by the First Amendment."[136] The First Amendment protects free speech. When protected speech becomes conduct, however, the state is allowed to step in and regulate that conduct.

The Supreme Court's ruling in *Mitchell* gives constitutional approval to statutes that enhance penalties at sentencing for bias crimes. This decision, therefore, supports using bias crime statutes similar to Wisconsin's law to address growing societal concern over bias crimes against gay men and lesbians.

III. Extending Sentencing Enhancement Penalties to Crimes Against Gay Men and Lesbians

Paul Steckman was brutally killed in a nation where homosexual status alone serves as a basis for discriminatory violence. This climate fosters attitudes like those of Smithton residents who understood that teenagers might consider beating up a gay man something that "might be cool."[137] This climate perpetuates anti-gay violence because its perpetrators recognize that gay men and lesbians are especially vulnerable victims lacking legal protection against discrimination. This climate does little to deter this violence because bias crimes against gays are not punished for their bias elements. Bias crimes against gay men and lesbians, therefore, continue to be a significant social problem.

Out of the forty-one states with bias crime statutes,[138] only fourteen states and the District of Columbia[139] specifically include sexual orientation as a protected class. Indiana's legislature dropped "sexual orientation" from its proposed hate crimes bill, as a Senate committee determined removing that "sexual orientation" as a protected class would encourage support for the measure in the Indiana Senate.[140] Seven states describe the classes protected under their bias statutes only in general terms.[141] Texas' hate crime statue adopted deliberately vague language, not naming any one group or classification, because disputes over inclusion of sexual orientation as a protected cate-

136. *Id.* at 2201.
137. Lewin, *supra* note 1, at A8.
138. *See supra* notes 9-10.
139. *See supra* note 87.
140. *Gay Protection Dropped from Hate-Crimes Bill*, CHI. TRIB., Feb. 22, 1994, at 3.
141. *See supra* note 10.

gory almost doomed the statute's passage.[142] Repeated efforts to pass hate crimes laws in Arizona[143] and New York[144] failed because opponents mobilized support against these bills because of the inclusion of sexual orientation as a protected category.

Sexual orientation must be explicitly included as a protected category in current and proposed bias crime legislation.[145] Extending bias crime statutes that enhance penalties at sentencing to include specifically those crimes committed because of the defendant's bias against the victim's sexual orientation is a first step toward eradicating violence against gay men and lesbians. Assigning criminal liability to a defendant's intentional victimization offers gay men and lesbians protection against anti-gay violence.

A. *Punishment of Both Crime and Bias*

Without the statutory protection of enhanced penalties, anti-gay crimes are not effectively punished and bias violence against homosexuals is not effectively deterred. When intolerance of homosexuality turns into violence against gay men and lesbians, it is difficult to separate the defendant's biased intent from the actual acts: these crimes occur because of hatred against gays. Without bias crimes laws, however, our criminal system punishes only the actual acts or attempts and the defendant's intent to commit the act. Traditional criminal statutes cannot reach the defendant's bias in selecting a victim, as laws focus on the

142. Sam Howe Verhovek, *With Four Gay Men Slain, Texas Revisits Issue of Hate Crime*, N. Y. TIMES, Aug. 30, 1994, at A15. Utah's hate crime statute also eliminated all references to any protected groups, which resulted in a "law . . . so weak, no prosecutor has ever attempted to use it." Paul Rolly, *The Rolly Report*, SALT LAKE TRIB., Aug. 21, 1994, at A2. Utah State Rep. Frank Pignanelli, who wrote the original hate crimes bill to include specific protected classes, will introduce another bill with these classes in the 1995 session, but has been told he would need to eliminate the reference to sexual orientation to pass the bill. *Id.* *See supra* note 10 (listing states that give broad descriptions of protected classes under their hate crime statutes).

143. Dennis Wagner, *Romley Aiming at Hate Crimes*, PHOENIX GAZETTE, Aug. 10, 1994, at B1.

144. Roni Rabin, *Sex-Bias Violence Lawsuit?*, NEWSDAY, Aug. 4, 1994, at A4.

145. In making this argument, it should be emphasized that these statutes do not offer any "special rights" to the victims in these classes. These statutes address two goals: first, punishing and deterring bias crimes against gays because of their divisive social effect; second, offering gay men and lesbians protection from violence. They do not give the homosexual victim any special standing in the criminal justice system, nor are they meant to act as a validation of homosexual conduct.

defendant's motive to act, not the defendant's bias.[146] By not reaching the defendant's biased intent, states permit defendants to act out their intolerance of homosexuality through violence. Criminal codes that do not address perpetrators' intentional, biased victim selection fail to recognize the psychic harm these victims suffer. The defendants are not penalized for contributing to the widespread social harms related to bias crimes[147] and the continuing victimization of homosexuals as a class.[148]

The result of the failure to punish bias crime perpetrators in proportion to the harm they cause is that continued violence against gay men and lesbians is not deterred. The defendant's bias is not challenged when the crime is prosecuted and punished, which means that the criminal justice system does not effectively deter or rehabilitate the defendant. The victim, the victim's class, and the community do not receive adequate retribution for these crimes because punishment solely for the crime itself does not force the defendant to recognize that bias-related crime is harmful to society and will not be tolerated by the community.

Though the state does not directly encourage hate crimes against gays, it fails to discourage these crimes when they occur if it does not punish the defendant for that bias. Punishing hate crimes based on sexual orientation educates both the defendant and our society, as it personalizes the costs of bias crimes to the defendant who commits these crimes. Undergoing additional punishment for crimes indicating biased intent clearly demonstrates to a defendant that society will not tolerate bias violence against gay men and lesbians.

B. *The Role of Punishing Bias Crimes in Educating Society About Anti-Gay Discrimination*

Enhancing penalties at sentencing for bias crimes against gays serves proactive and educational goals, as they not only reach the individual defendants but society as well. Prosecution of anti-gay bias crimes, combined with publicity of anti-gay bias crimes, displays society's disapproval of anti-gay violence. Requiring communities to punish bias crimes against homosexuals is one way to eradicate social biases that view gay men and lesbians as unprotected, expendable victims. Educating the community about the evil of intolerance deters crimes against gay men and

146. *See* WALTER LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 216-25 (2d. ed. 1986).

147. *See supra* text accompanying notes 15-23.

148. Thomas, *supra* note 23, at 1464.

lesbians. Bias crime statutes that do not include sexual orientation as a protected category miss the opportunity to eradicate the significant social problem of bias against gays.

Bias crimes statutes also function as an educational tool for the state to counter discrimination. As one commentator says:

> Message sending['s] . . . goal is to express the abhorrence of certain bigotries in the strong and unambiguous language of the criminal law. This educative use of criminal law is familiar in American jurisprudence, and it has a legitimate role to play in our legal system.[149]

Legislatures and courts have traditionally used law to educate American society. One example of using law to address bias involves statutes restricting racial discrimination. Implementing civil rights protections forced Americans to address their racial biases. Though these laws have not eradicated racism, they have demonstrated the intolerance of the American public toward racism in employment, education and housing. Statutes that expressly protect gay men and lesbians from bias violence similarily reflect a judgment of society that bias based on sexual orientation is a disturbing, destructive and anti-social phenomenon that will be specifically punished should it result in violent crime.

These proactive and educative goals are important in order to eradicate bias crimes against gay men and lesbians. Psychologists' studies show that homophobia and related disordered psychological conditions do not go far enough to explain why gay bashing occurs.[150] "It's very functional to be prejudiced," says psychologist Gregory Herek. "It's reinforced by friends, by churches, and by society. They don't get any contradictory messages from the media saying its [sic] bad to gay-bash."[151] Bias crimes statutes are necessary to educate against crimes based on the defendant's bias towards gay men and lesbians because other sources do not consistently reject these acts. States can also effectively rebut any claims that they tolerate gay bashing by enacting and prosecuting these bias crimes.

C. *Equal Protection from Violence for Gay Men and Lesbians*

Bias crime statutes should also expressly protect gay men and lesbians against violence, because including sexual orientation in these laws preserves the fundamental rights of homosexu-

149. Jacobs, *supra* note 22.

150. PHILIP M. KAYAL, BEARING WITNESS: GAY MEN'S HEALTH CRISIS AND THE POLITICS OF AIDS 81 (1993) (citing John Voelcker, *The Second Epidemic*, OUTWEEK, July 11, 1990, at 48, 49).

151. *Id.*

als to protection of person and property as guaranteed in the Constitution. Under the Fourteenth Amendment,[152] laws are required to "treat all persons equally and fairly, and not invidiously or arbitrarily,"[153] in matters involving these fundamental rights. Primary among these rights is the freedom from violence perpetrated by private individuals. Criminal laws that fail to protect gay men and lesbians from violence violate this standard. Homosexuals receive a lowered standard of protection of person and property under these general laws because the laws do not fully protect gay men and lesbians from anti-gay violence when that bias goes unpunished by traditional criminal sentencing.

Sentencing penalty enhancement statutes for anti-gay crimes secure the protections of the Fourteenth Amendment for gay men and lesbians. "These statutes afford lesbians and gay men the same civil rights to which all other groups are entitled: the right to live, love and work free from violence."[154] These rights are rights of citizenship denied to gay men and lesbians because the states fail to discourage violence against them because of their homosexual status. Explicitly addressing violence against gays does not give gays any special rights, because "when victims of irrational discrimination demonstrate that protection is warranted, they do not receive 'special rights.' Rather, they merely take on the same burden-free status as the majority."[155] Because protection against sexual orientation violence is warranted from the evidence of these bias crimes, granting that protection through these statutes preserves the fundamental rights of gays under the Constitution.

Despite these arguments favoring specifying sexual orientation as a protected class, including sexual orientation as a protected category under bias crime statutes has proven elusive. Classifying by sexual orientation remains controversial, even when these statutes only emphasize basic protections and do not offer new rights, because homosexuality is not recognized as a basis for legal protections. The next three sections address some common arguments against specifically including sexual orientation as a protected category.

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152. U.S. CONST. amend. XIV.

153. John C. Hayes, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny after* Bowers v. Hardwick, 31 B.C. L. REV. 375, 376 (1990).

154. Thomas, *supra* note 21, at 1907.

155. *Id.* at 1907 n.19.

D. *Sexual Orientation Versus Sexual Conduct: The* Bowers *Problem*

Legislatures' attempts to protect gay men and lesbians by extending bias crime statutes to punish sexual orientation bias crimes are often countered by arguments declaring that "according special protection to a class whose defining characteristic, homosexual conduct, can be made illegal"[156] makes these efforts illogical. These ideas draw from the Supreme Court's 1986 decision in *Bowers v. Hardwick*,[157] which denied gay men and lesbians their right to sexual privacy, allowing states to regulate same sex sodomy.

Bowers involved Michael Hardwick's challenge of the constitutionality of Georgia's sodomy law.[158] Speaking for the majority of the Court, Justice White refused to extend the right of privacy to acts of consenting adult homosexuals, stating that "none of the rights announced in those [privacy] cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy."[159] Georgia therefore had the right to regulate and criminalize homosexual sodomy.

Opponents of extending bias crime statutes to include sexual orientation argue that *Bowers* should be read to deny legal protection to homosexuals as a class. This argument fundamentally misunderstands the purpose and impact of bias crime statutes. The focus of bias crime statutes is to deter crimes against gay men and lesbians, not to protect them from sodomy statues. Bias crime statutes primarily focus on punishing, deterring, and rehabilitating the bias-motivated criminal because of the detrimental effects of bias violence in society. These statutes do not afford gay victims any additional legal rights; they merely enforce the fundamental rights of gay men and lesbians to be free from violence against person and property. Extending bias crimes statutes to include sexual orientation does not address homosexual conduct, and therefore does not interfere with states' right to regulate that conduct.

E. *Homosexual Status as an Illegitimate Basis for Legal Discrimination*

Bowers allows states to criminalize homosexual conduct, but does not allow states to criminalize sexual orientation. No state has the right to do so: the status of an individual cannot consti-

156. Steffan v. Aspin, 8 F.3d 57, 62-63 (D.C. Cir. 1993), *rev'd sub nom.* Steffan v. Perry 1994 WL 652249 (D.C. Cir. Nov. 22, 1994).

157. 478 U.S. 186 (1986).

158. *Id.* at 188.

159. *Id.* at 190-91.

tute a criminal offense.[160] Courts have also recently affirmed that homosexual status alone cannot be the basis for discrimination even when homosexual conduct is actionable. Therefore, because homosexual status is not illegal, it should not limit gay men and lesbians' fundamental right to protection from violence.

A recent decision involving a challenge to the United States Department of Defense's policies on homosexuals in the military emphasizes that homosexual status alone cannot justify discrimination against homosexuals. In *Meinhold v. United States Department of Defense*,[161] the Ninth Circuit held that the Navy could not discharge a serviceman for stating that he was gay. Petty Officer Volker Keith Meinhold stated, "Yes, I am in fact gay," on ABC World News Tonight's May 19, 1992 telecast.[162] The next day the Navy instigated discharge proceedings; Meinhold was given an honorable discharge on August 12, 1993.[163] Meinhold sued to gain reinstatement, asking for a declaration that the Department of Defense's policy against homosexuals in the military at the time of the trial was unconstitutional.[164] The District Court granted Meinhold's motion for summary judgment, ordered his reinstatement and permanently enjoined the Department of Defense from discharging or denying enlistment based on sexual orientation after finding that the Navy's policy violated the Equal Protection clause of the Fifth Amendment by banning gays based on status, not conduct.[165]

On appeal, the Ninth Circuit affirmed Meinhold's reinstatement. It found that Meinhold's statement of his homosexual status "manifests no concrete, expressed desire to commit homosexual acts."[166] The Court did not affirm, however, the District Court's holding that the Directives did not pass "constitutional muster."[167] Judge Rymer deferred to the Navy's professional judgment and accepted that "[t]he presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accom-

160. Robinson v. California, 370 U.S. 660 (1962).
161. 34 F.3d 1469 (1994).
162. *Id.* at 1472.
163. *Id.* at 1473.
164. *Id.*
165. *Id.* at 1472.
166. *Id.* at 1479.
167. *Id.* at 1479.

plishment of the military mission."[168] But in finding the military's regulation of homosexual conduct constitutionally acceptable, Judge Rymer also emphasized that "[n]othing in the policy states that the presence of persons who say they are gay impairs the military mission."[169]

Therefore the Directives can be construed to avoid Equal Protection questions by reading the regulations to "mandate separation due to a statement of homosexuality only when that statement itself indicates more than the inchoate 'desire' or 'propensity' that inheres in status."[170] The Department of Defense's Directives, therefore, "reach a statement of homosexuality only when the statement itself manifests a concrete, expressed desire or intent to engage in homosexual acts."[171]

Because the Court found that Meinhold's statements did not implicate this desire or intent, they ruled that the Navy based Meinhold's separation solely on his classification as a homosexual.[172] Therefore, Meinhold's dismissal on this basis cannot be upheld.[173]

This case emphasizes that homosexual status must be considered separately from homosexual conduct. The *Meinhold* court granted great deference to the military's policies against homosexual conduct; despite that deference, the Court did not allow the military's concern about homosexual conduct to permit discrimination against homosexuals who acknowledge this status. Arguments against homosexual conduct may be legitimate; discharge because of homosexual status alone raises concerns.

Meinhold recognizes that homosexual orientation, not homosexual conduct, is an illegitimate basis for discrimination in the military. This supports the logical separation between status and conduct; opposition to including sexual orientation as a protected category because of homosexual conduct disregards this separation. This conclusion respects the rights of many who deplore homosexual conduct, while not allowing state actors to

168. *Id.* at 1477 (quoting Department of Defense Directive 1332.14(H)(1)(a)).

169. *Id.* at 1479.

170. *Id.* at 1479. *But cf.* Steffan v. Perry, 1994 WL 652249 at 5 (D.C. Cir. Nov. 22, 1994) (declaring that "the military may reasonably assume that when a member states that he is a homosexual, that member means that he either engages or is likely to engage in homosexual conduct.").

171. *Id.* at 1472.

172. *Id.* at 1479.

173. *Id.* at 1479-80. The Clinton Administration has decided not to challenge the 9th Circuit's decision, because it was decided under military regulations that have since been rewritten. Stephen Labaton, *Victory for Gay Sailor Leaves Issue Unresolved*, N.Y. TIMES, Dec. 4, 1994, at E2.

discriminate on the sole basis of homosexual orientation. Extending bias crimes statutes to include sexual orientation, therefore, does not interfere with states' right to regulate homosexual conduct.

F. *Recognition of Differences Between Homosexual* Status *and Homosexual* Conduct *by Major Religions*

Bias crime regulations face opposition from religious and political groups that share a common belief that homosexual conduct is immoral. Many American religious groups voice objections to giving gay men and lesbians any form of legal recognition, including the protection of enhanced penalties for bias crimes based on sexual orientation, because of their beliefs concerning homosexuality.

Most major American denominations, including the Roman Catholic Church, liberal Protestants, conservative Evangelicals, and both Conservative and Orthodox Jews do not approve of homosexual conduct.[174] Religious groups' opposition to homosexual conduct extends to opposition to state action that affirms the "gay lifestyle" as an acceptable, alternative lifestyle to the heterosexual norm. These groups might construe bias crime protections as state approbation of the "gay lifestyle," which they consider to be inherently opposed to the "traditional" family values they espouse.

The official position of the Roman Catholic Church makes a sharp distinction between one's sexual orientation, which by itself is not morally wrong, and one's sexual conduct, which the Church teaches should be confined to vaginal, non-contracepted intercourse in a heterosexual marriage. Despite this criticism of homosexual conduct, the Roman Catholic Church does not tolerate violence against gays:

> [I]t is deplorable that homosexual persons have been and are the object of violent malice in speech or in action. Such treatment deserves condemnation from the church's pastors wherever it occurs. It reveals a kind of disregard for others which endangers the most fundamental principles of a healthy society. The intrinsic dignity of each person must always be respected in word, in action and in law.[175]

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174. J. Gordon Melton, *The Churches' Ethical Dilemma with Homosexuality, in* THE CHURCHES SPEAK ON: HOMOSEXUALITY xxvi (1991) [hereinafter CHURCHES].

175. *Doctrinal Congregation's Letter to Bishops: The Pastoral Care of Homosexual Persons,* 16 ORIGINS 377, 380-81 (1986).

Not one of these major American religious traditions condones violence against homosexuals because of their sexual orientation, regardless of whether or not they accept homosexual conduct. Both Roman Catholics and liberal Protestants describe homosexual orientation by itself to be a "morally neutral condition"; this stance encourages church religious leaders and members to work to eradicate prejudice against homosexuals because of their status.[176]

Other religious denominations also condemn violence against gay men and lesbians. In 1988, the Episcopal Church approved a resolution on violence against homosexuals that "decries the increase of violence against homosexual persons and calls upon law enforcement officials . . . to be sensitive to this peril and to persecute the perpetrators of these acts to the fullest extent of the law."[177] The Church encouraged all Bishops to "speak openly and publicly to repudiate the misconception that the Church encourages such violence."[178] In 1983, the United Church of Christ called for its members to support "[l]egislative change that insures the elimination of violent acts perpetuated because of . . . sexual orientation."[179] The Presbyterian Church in the United States has held that "there is no legal, social, or moral justification for denying homosexual persons access to the basic requirements of human social existence."[180]

These religious traditions, though they do not approve of homosexual conduct, affirm that homosexual status is not a rationale for violence against gay men and lesbians. Because bias crimes statutes focus on homosexual status rather than conduct, they do not contradict the churches' views on this issue. In fact, by enacting anti-gay bias crime measures, states act in accordance with these religious teachings by working against violence based on sexual orientation. Therefore, these anti-gay bias crime statues affirm the major religious denominations' position on homosexual orientation and should not be opposed on the basis of claims that these statutes contradict religious teachings.

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176. CHURCHES, supra note 174, at xxvii.

177. *Resolution on Violence Against Homosexuals, Episcopal Church (1988), reprinted in* CHURCHES, *supra* note 174, at 103-104.

178. *Id.*

179. *Report of the Task Force for the Study of Human Sexuality, United Church of Christ* (1983), *reprinted in* CHURCHES, *supra* note 174, at 231.

180. *Statement on the Ordination of Homosexuals: Policy Statement and Recommendations, Presbyterian Church (U.S.A.)* (1978), *reprinted in* CHURCHES, *supra* note 174, at 155.

CONCLUSION

Bias crimes based on actual or perceived sexual orientation require penalty enhancements at sentencing to give gay men and lesbians equal protection from violence to their persons and property. By its very definition, society guarantees all of its members freedom from violence, and provides legal remedies for others' infringements of these rights. When our government fails to protect segments of society from bias-related crimes based on sexual orientation by failing to deter these crimes through effective punishment of discriminatory action, it fails in its essential mission.

Requiring bias crime statutes specifically to include sexual orientation to enhance penalties for bias crimes is one solution to this problem. Without this specific assignment of criminal liability, basic protections from violence of person and property are not fully guaranteed to gay men and lesbians.[181] Because it is "[t]he first duty of the Government to afford protection to its citizens,"[182] states need to recognize that including sexual orientation as a protected category is necessary to the protection of its citizens. Not only do these penalty enhancement statutes punish bias crimes against gays, they affirm the states' interest in eliminating bias violence. Only through forceful promotion of this interest can states ensure that their gay and lesbian citizens avoid the fate of Paul Steckman.

181. U.S. CONST. amend. XIV.

182. Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 508 (1992) (citing CONG. GLOBE, 39th Cong., 2d Sess. 101 (1867)(remarks of Rep. Farnsworth) (debating the Reconstruction Act of 1867).